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IN THE
COURT OF APPEALS OF INDIANA

KEVIN DAWAYNE CLOPTON,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 02A04-0606-CR-317
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable John F. Surbeck, Jr., Judge
Cause No. 02D04-0509-FA-56

February 9, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Kevin Clopton appeals the sentence imposed after he pled guilty to burglary as a Class B felony. We affirm.

Issue

The sole issue for our review is whether the trial court erred in sentencing Clopton.[1]

Facts

At 11:00 p.m. on September 15, 2005, twenty-five-year-old Taylor University student Clopton kicked in the front door of Susan and Doug Hamms' Allen County home. Clopton was armed with a gun, which he pointed at Mr. Hamm and his dog. Clopton demanded drugs and money and threatened to shoot both Mr. Hamm and the dog. Clopton struck Mr. Hamm with his gun, and stole money, a cordless phone, and a two-way radio.

The State charged Clopton with Class A felony burglary, Class B felony robbery, Class C felony battery, and Class C felony carrying a handgun without a license. Clopton pled guilty to burglary as a Class B felony, and the State dropped the remaining charges. The plea agreement did not specify the number of years to be imposed.

At the sentencing hearing, the trial court found the following four mitigating factors: 1) Clopton's poor childhood; 2) a lengthy incarceration would impose a hardship

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[1] Clopton makes no Blakely argument.

on his family; 3) Clopton pled guilty; and 4) two young women, the mother of his child and a friend that has known him for ten years, spoke on Clopton's behalf at the sentencing hearing. The court further found that Clopton's criminal history, including a prior felony conviction for theft that resulted in a probation revocation and misdemeanor convictions for domestic battery, criminal mischief for destroying another's property, and invasion of privacy, was an aggravating factor. The court concluded that Clopton's criminal history indicated a total disregard for the law as well as the community and its citizens. The court also found as an aggravating factor that Clopton engaged in this criminal conduct despite the positive things in his life, including being a student at Taylor University. Finding that the aggravating factors substantially outweighed the mitigating factors, the trial court sentenced Clopton to an enhanced twenty-year sentence. Clopton appeals his sentence.

Analysis

As a preliminary matter, we note that Clopton committed this offense after the April 25, 2005, effective date of the new advisory sentencing statutes. See Gibson v. State, 856 N.E.2d 142, 146 (Ind. Ct. App. 2006). In Gibson, we noted that the new statutes raise questions as to the respective roles of trial and appellate courts in sentencing, the necessity of a trial court continuing to issue sentencing statements, appellate review of a trial court's finding of aggravators and mitigators under a scheme where the trial court does not have to find aggravators or mitigators to impose any sentence within the statutory range for an offense, including the maximum sentence, as

well as the validity or relevance of well-established case law developed under the old presumptive sentencing scheme. Id.

Although we attempted to address these questions in Anglemyer v. State, 845 N.E.2d 1087 (Ind. Ct. App. 2006), our Supreme Court swiftly granted transfer. Id. Until that court issues an opinion in Anglemyer, we will assume that it is necessary to assess the accuracy of the trial court's sentencing statement according to the standards developed under the presumptive sentencing system while keeping in mind that the trial court had discretion to impose any sentence within the statutory range for Class B felonies, regardless of the presence or absence of aggravating or mitigating factors. See Ind. Code 35-38-1-7.1(d).

Further, we will assess the trial court's recognition or nonrecognition of aggravators and mitigators as an initial guide to determining whether the sentence imposed here was inappropriate. See Gibson, 856 N.E.2d at 147. In other words, even if it would not have been possible for the trial court to have abused its discretion in sentencing Clopton because of any purported error in the sentencing statement, it is clear that we may still exercise our authority under Article 7, Section 6 of the Indiana Constitution and Indiana Appellate Rule 7(B) to revise a sentence we conclude is inappropriate in light of the nature of the offense and the character of the offender. See id.

In reviewing a sentencing statement, we are not limited to a written sentencing statement but may consider the trial court's comments in the transcript of the sentencing proceedings. Corbett v. State, 764 N.E.2d 622, 631 (Ind. 2002). Here, the trial court did

not issue a written sentencing statement. Rather, the court supported its decision by its comments at the sentencing hearing. Specifically, the court explained that the aggravating circumstances, including Clopton's criminal history and the fact that he engaged in criminal activities despite the positive things in his life, substantially outweighed the mitigating factors, including 1) Clopton's poor childhood; 2) a lengthy incarceration would impose a hardship on his family; 3) Clopton pled guilty; and 4) two young women spoke on Clopton's behalf. The court relied heavily on Clopton's criminal history, which the court felt indicated a total disregard for the law as well as the community and its citizens.

Clopton contends that the trial court failed to properly give credit to the following mitigating factors: 1) his guilty plea; 2) he acted under strong provocation; 3) he is likely to respond affirmatively to probation or short term of imprisonment; 4) his character and attitudes indicate that he is unlikely to commit another crime; 5) he had made or will make restitution to the victim of the crime; and 6) imprisonment of the person will result in undue hardship to his dependents. However, the trial court did consider two of the mitigators, the fact that Clopton pled guilty as well as the hardship to his dependents. Our Supreme Court has often noted that the hardship mitigator can properly be assigned no weight where, as here, the defendant fails to show why incarceration for a particular term would cause more hardship than incarceration for a shorter term. See Weaver v. State, 845 N.E.2d 1066, 1074 (Ind. Ct. App. 2006), trans. denied. As to Clopton's other proposed mitigating factors, there is simply no evidence in the record of the proceedings establishing that they should be factors in determining Clopton's period of incarceration.

See Henderson v. State, 848 N.E.2d 341, 345 (Ind. Ct. App. 2006) (stating that the trial court did not err in failing to consider Henderson's health as a mitigating factor where there was no evidence in the record establishing that her health should be a factor in determining her period of incarceration).

Having analyzed the trial court's oral sentencing statement at the sentencing hearing and having found no error in it, we now address under Indiana Appellate Rule 7(B) whether Clopton's sentence is inappropriate.[2] Clopton's specific argument is that he is not the worst offender and his crime is not the worst offense. This court has previously explained as following regarding the worst offender and worst offense principle:

> There is a danger in applying [this principle because] [i]f we were to take this language literally, we would reserve the maximum punishment for only the single most heinous offense. In order to determine whether an offense fits that description, we would be required to compare the facts of the case before us with either those of other cases that have been previously decided, - or more problematically – with hypothetical facts calculated to provide a "worst-case scenario" template against which the instant facts can be measured. If the latter were done, one could always envision a way in which the instant facts could be worse. In such case, the worst manifestation of any offense would be hypothetical and not real, and the maximum sentence would never be justified.
>
> This leads us to conclude the following with respect to deciding whether a case is among the very worst offenses and a defendant among the very worst offenders, thus justifying the maximum sentence: We should concentrate less on comparing the facts of this case to others, whether real or hypothetical, and more on focusing on the nature, extent, and depravity of the offense for which the defendant is being sentenced, and what it reveals about the defendant's character.

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[2] Clopton argues that his sentence is manifestly unreasonable. However, the State correctly points out that effective January 1, 2003, Indiana Appellate Rule 7(B) no longer contains the phrase "manifestly unreasonable." Rather, the rule now provides that we may revise a sentence authorized by statute if, after due consideration of the trial court's decision, we find that the sentence is inappropriate in light of the nature of the offense and the character of the offender.

Brown v. State, 760 N.E.2d 243, 247 (Ind. Ct. App. 2002), trans. denied.

Here, with regard to the character of the offender, Clopton has a criminal history that includes a prior felony conviction for theft that resulted in a probation revocation as well as misdemeanor convictions for domestic battery, criminal mischief, and invasion of privacy. Clopton's prior contacts with the law have not caused him to reform himself. Further, Clopton engaged in this criminal conduct despite having positive things in his life, including being a student at Taylor University.

With regard to the nature of the offense, at eleven o'clock at night, while armed with a gun, Clopton kicked in the front door of the Hamms' home while the Hamms were there and threatened to shoot Mr. Hamm and the Hamms' dog. Clopton demanded money and drugs, struck Mr. Hamm with his gun, and left with money, a cordless phone, and a two-way radio. Clopton's prior felony theft conviction and misdemeanor convictions for domestic battery, criminal mischief for destroying another's property, and invasion of privacy, show a pattern of crimes indicating a disregard for other persons and their property as well as an escalation in the threat of violence to those persons. See Ruiz v. State, 818 N.E.2d 927, 929 (Ind. 2004) (holding that the significance of prior criminal history varies based on the gravity, nature, and number or prior offenses as they relate to the current offense).

Based upon our review of the evidence, we see nothing in the character of this offender or the nature of this offense that would suggest that Clopton's twenty-year-sentence for one count of burglary as a class B felony is inappropriate.

Conclusion

The trial court did not err in sentencing Clopton. We affirm.

Affirmed.

SULLIVAN, J., and ROBB, J., concur.